87-143

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

MABEL G. WELLS,
Petitioner

v.

VIRGINIA COMMONWEALTH UNIVERSITY,
and
WAYNE C. HALL,
Respondents

On Appeal from the United States Court of Appeals
for the Fourth Circuit

PETITION FOR CERTIORARI

Mabel G. Wells
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QUESTIONS PRESENTED

I. Did the United States Court of Appeals for the Fourth Circuit err in holding that Petitioner was afforded due process during her promotion review, where the peer review committee and dean reviewed supporting documents and recommended promotion, but the provost/vice president and the university committee declined to review supporting documents, and recommended against promotion to full professor?

II. Did the United States Court of Appeals for the Fourth Circuit err in holding that Petitioner was afforded due process, where Respondents in declining to recommend promotion to full professor, ignored the established criteria of Petitioner's school, which criteria had been fulfilled by Petitioner?

III. Did the United States Court of Appeals, Fourth Circuit err in holding that Respondents did not violate Title VII in declining to recommend Petitioner, who is black, for promotion to full professor, where white persons with similar or less qualifications were recommended for promotion to full professor?

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_____Term, 1987

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and

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PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (A-1 infra) is unreported. The opinion of the United States District Court for the Eastern District of Virginia (A-10 infra) is unreported.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on April 9, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1981

42 U.S.C. §1983

42 U.S.C. §2000e-2, Title VII of the Civil Rights Act of 1964

STATEMENT OF THE CASE

Petitioner, a black female, was employed as an assistant professor from 1973-1978, and as a tenured associate professor from 1978 to present, in the School of Social Work at Respondent, Virginia Commonwealth University ("VCU"). VCU is a state university located in Richmond, Virginia.

Petitioner has held a Master's degree in Social Work since 1957. She has held a Ph.D. in Social Work and Social Research since 1978.

From 1971-1973 Petitioner was a doctoral student and admissions associate at Bryn Mawr College,

Pennsylvania. From 1969-1971 she was assistant professor of Social Work at Smith College, Northampton, Massachusetts. From 1966-1969 Petitioner was employed as assistant professor of Social Work at California State University at Fresno. From 1957-1966 Petitioner was employed in Child Welfare and psychiatric social work positions in Washington, D.C., for the state of California, and for the county of Madera, California.

Petitioner submitted herself for review for promotion to the rank of full professor on November 1, 1983. She presented the foregoing experience background and accomplishments in the content of a curriculum vita, plus supporting materials, which included published materials, notation and evidence of invitational national conference presentations, evidence of an international presentation (London, England), tapes of presentations at national meetings, teaching evaluations, programs, letters of citation and letters of recognition. Later included in the materials were thirteen (13) letters from outstanding social work education officials, educators and practitioners throughout the country, which at-

tested to Petitioner's professional achievements and thus acknowledged "national reputation." Such 13 letters had been solicited by the school peer committee in their effort to define and establish "national reputation" as an implicit criterion.

The progression of promotion and tenure review established in VCU university spolicy was as follows:

Peer Promotion and Tenure Committee of Department and/or School

Department Chairman/Dean of School

Provost/Vice President of University

University Promotion and Tenure Committee

The recommendation of the University Promotion and Tenure Committee is submitted to the President for approval.

The University Promotion and Tenure Policies and Procedures (adopted September 24, 1981) governs the tenure and promotion process at VCU. In Section 1, page 2 of this document it is stated:

> In addition to this document, each school within the university has promotion and tenure guidelines consistent with the university-wide policies, but specifying details to meet the particular needs of the unit. Those guidelines give consideration to pro-

> cedural variations, composition of committees, criteria for promotion and tenure related to the mission of the school, definition of tenurable and non-tenurable (collateral) faculty, appropriate criteria for promotion of collateral faculty, and the relation of the promotion and tenure system to the school's policies of faculty evaluation, review and development. The guidelines are available in written form in the office of the dean of each school.

In accordance with this authorization, the School of Social Work approved and adopted its promotion and tenure document October 11, 1982. The School peer committee reviewed petitioner based on its adopted document.

> The general criteria established by the University in the evaluation of all tenure-eligible or tenured faculty for tenure and/or promotion shall apply in the School of Social Work. In addition, the specific criteria developed herein address the uniqueness of the School of Social Work and the special competencies required of faculty in the School. (Promotion and Tenure Document, Section D, page 6, School of Social Work, Oct. 11, 1982).

The general criteria noted above are:

1. Appropriate preparation, background, experience and professional growth
2. Demonstrated quality in teaching
3. Continuing scholarship

4. Performance of service responsibilities to the University, School, Department and broader community

5. Possession of relevant personal qualities

The guidelines on these criteria are established in the School of Social Work Promotion and Tenure Document, and

> Promotion to Professor is reserved for those who have been recognized for distinction and excellence of their achievements. A candidate considered for promotion at the Professor level would be expected to receive not less than an "adequate" rating in all areas and at least a "more than adequate" rating in one of the following areas and an "outstanding" in two of the following areas: teaching, scholarship, service. (Section D 2 c, p. 9).

Petitioner was rated by the school peer committee as "outstanding" in teaching, "outstanding" in service, and "more than adequate" in continuing scholarship. The School peer committee recommended promotion to full professor to the dean, who supported the School peer committee's recommendation and recommended promotion to Respondent, Wayne Hall, provost/vice president, who is a white male. (Respondent Hall retired from the University in 1985). Respondent Hall declined to support the positive

recommendations on the basis that the promotion was "premature," and "she is lacking in research and publication at the levels expected of a full professor to gain national recognition." (Hall memorandum, Jan. 5, 1984).

Respondent Hall subsequently submitted a negative recommendation to the University committee, which also decided not to recommend promotion on the basis that Petitioner lacked scholarly activity and the national reputation required or desired for promotion to full professor. Neither Respondent Hall nor the University committee reviewed Petitioner's supporting documents. They also ignored the School of Social Work's approved criteria for promotion and tenure. Further, from 1982-1985 several white persons were recommended for promotion to full professor by Respondent Hall and the University committee, even though their records of scholarly activity were less substantial than than of Petitioner.

Petitioner filed suit in 1984 in the United States District Court for the Eastern District of Virginia pursuant to 42 U.S.C. §§1981 and 1983 and

42 U.S.C. §2000-e, Title VII of the Civil Rights Act of 1964 against Virginia Commonwealth University and Wayne C. Hall in both his individual and official capacity as Provost/Vice President for Academic Affairs for VCU. Petitioner alleged that she was denied due process in her promotion review and that she was discriminated against based upon her race, and sought back pay, front pay, an injunction ordering Respondents to promote her to the rank of full professor and compensatory and punitive damages.

The case was heard without a jury on December 20, 1985, and the court, in a February 27, 1986 memorandum opinion, denied all claims presented by Petitioner. The United States Court of Appeals for the Fourth Circuit affirmed the District Court's decision on April 9, 1987.

REASONS FOR GRANTING THE WRIT

In this case the Appeals Court cited and relied upon Clark v. Whiting, 607 F.2d 634 (4th Cir. 1979), in holding that Petitioner's constitutional rights had not been violated. Clark is inapposite to Petitioner's case in that the court criticized Clark for asking the court to exercise judicial supervision over the academic operations of a university. Petitioner has not asked the Court to pass judgment on materials submitted in support of promotion. It is well understood that universities are better equipped to perform such functions than the courts. Rather, Petitioner asks whether the failure of the provost/vice president and the University committee to review relevant materials supporting Petitioner's claim of sufficient scholarly activity to warrant promotion to full professor, before recommending against promotion, establishes an inadequacy in the University's review process, and resulted in a denial of Petitioner's due process rights.

The issues presented in this case do not lend themselves to the usual reluctance of courts to become involved in university employment decisions in-

volving promotion and tenure. Petitioner is concerned about this reluctance, especially in her case, where a resolution of the issues would not require a court to become involved in the inner workings of a university's administration. Thus, Petitioner urges this Court to grant certiorari in this important case involving the constitutional rights of those employed in the academic world, in the hope that there will be some distinction between university evaluative and professional judgment operations, in which courts should not become involved, and whether a university's processes meet the requirements of due process. This latter question must be addressed by courts and is one that is within courts' capabilities and competence.

Further, Petitioner sought review of her race discrimination claim. She proved a prima facie case of discrimination in accordance with the test set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See also Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978). Petitioner presented evidence that several white per-

sons with less substantial qualifications had been recommended for promotion to full professor by Respondent Hall and the University committee. Respondents failed to carry the burden which shifted to them. Their alleged "legitimate, nondiscriminatory reasons," that "promotion at this time is premature," and that Petitioner "is lacking in research and publication at the levels expected of a full professor to gain national recognition" is merely pretextual because these reasons were not applied in the case of the white persons.

CONCLUSION

For the reasons discussed above, Petitioner respectfully requests that this petition for writ of certiorari be granted.

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CERTIFICATE OF SERVICE

I certify that I have this 8th day of July, 1987, filed 40 copies of this petition in the office of the Clerk, Supreme Court of the United States, and have mailed two copies of the petition to David L. Ross, Esq., Special Assistant Attorney General and Legal Advisor, Office of the Legal Advisor, 1010 E. Marshall Street, Box 116, MCV Station, Richmond, Virginia 23298-0001.

Mabel G. Wells

Mabel G. Wells

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1561

Mabel G. Wells,

Plaintiff-Appellant,

versus

Virginia Commonwealth University;
Wayne C. Hall, Individually,

Defendant-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., Senior District Judge. (CA-85-274-R)

Argued February 4, 1987. Decided April 9, 1987

Before PHILLIPS and WILKINSON, Circuit Judges, and SPENCER, United States District Judge for the Eastern District of Virginia, sitting by designation.

Sa'ad El-Amin for Appellant; David Lee Ross, Special Assistant Attorney General (Patrick B. Kelly, Special Assistant Attorney General, Virginia Commonwealth University Legal Advisor's Office; Mary Sue Terry, Attorney General of Virginia on brief) for Appellees.

PER CURIAM:

Mabel Wells, as associate professor at Virginia Commonwealth University, appeals the district court's judgment that officials at Virginia Commonwealth University (VCU) did not discriminate against her on the basis of race or violate her due process rights when they denied her request to be promoted to full professor. Because we find no basis in the record for disturbing the district court's judgment, we affirm.

I

Wells began her employment at VCU in 1973 as an assistant professor in the School of Social Work. In 1978 she received her Ph.D in Social Work and was promoted to associate professor. In 1983, consistent with accepted practice, Wells nominated herself for promotion to full professor. In support of her nomination she submitted to the School of Social Work's promotion and tenure committee (School Committee) certain documents reflecting her scholarship, including an article published in a refereed journal, a conference paper, a book review, and other written works. After reviewing Wells' promotion file the

School Committee voted to recommend her promotion by a vote of five to two.

The Committee forwarded its recommendation to Dr. Grace Harris, the Dean of the School of Social Work. Adding her recommendation to that of the School Committee Dr. Harris stated:

> [A]lthough her published work is somewhat limited, she had compensated for this by presenting papers, serving on accredidation [sic] teams and participating on various panels and programs at the local, state, and national level. This is not an unusual pattern for a faculty member in social work education, especially for one who has come into academia somewhat late. Her commitment to scholarly activity and development is evident, and her productivity is projected to increase over the next several years. She is currently engaged in several research projects and hopes to publish the findings of these projects.

These recommendations along with Wells' statement of self-evaluation and curriculum vitae were then forwarded to Dr. Wayne Hall, Provost and Vice-President for Academic Affairs. The other documents submitted by Wells were not forwarded but it was noted that these were available upon request.

Dr. Hall, without reviewing the written works submitted by Wells, decided against recommending Wells for promotion, observing that she was "lacking

in research and publication at the levels expected of a full professor to gain national recognition." The positive recommendations of Dr. Harris and the School Committee and Dr. Hall's negative recommendation then went to the University Promotion and Tenure Committee (University Committee). The University Committee also voted against recommending Wells for promotion, stating:

> Even though minimum criteria might have been met on the surface, the lack of scholarly activity and national reputation required or desired for advancement to the highest rank make a positive decision difficult. In view of all the evidence a negative decision is appropriate.

Because only positive recommendations of the University Committee are forwarded to the President of VCU, Wells' promotion request never received his consideration. Wells' appeal of the University Committee's negative recommendation to the University Promotion and Tenure Appeal Panel was unsuccessful.

Wells filed this action in 1985 alleging that the negative recommendations of Dr. Hall and the University Committee were the result of race and/or sex discrimination in violation of Title VII and 42 U.S.C. §§ 1981 and 1983. She also alleged that de-

fendants had violated her due process rights by failing to review all the materials in her promotion file. At the bench trial on her claim, Wells presented no direct evidence of racial discrimination, seeking instead to create an inference of discrimination by showing otherwise unexplainable disparate treatment. Her evidence of disparate treatment came entirely in the form of "summary sheets" that were used by the University Committee when evaluating candidates for promotion. These summary sheets were purported to demonstrate that whites with fewer publications and lesser qualifications than Wells had been promoted. Wells supported her due process claim by presenting evidence that neither Dr. Hall nor the University Committee had ever reviewed the examples of her scholarship submitted with her request for promotion.

Dr. Hall and members of the University Committee testified that the summary sheets were not always an accurate reflection of all the information available to the Committee about particular candidates. They also testified that race was not a factor in their decision not to recommend Wells for promotion.

The district court held that plaintiff had presented absolutely no evidence of discriminatory motive on the part of defendants and that the decision of defendants not to review the contents of Wells' publications and other materials did not rise to the level of a constitutional violation. Accordingly it found for defendants on all claims. This appeal followed.

II

We cannot overturn the district court's finding that the decisions of Dr. Hall and the University Committee were not motivated by racial animus unless it is clearly erroneous. Pullman-Standard v. Swint, 456 U.S. 273, 287-89 (1982) (ultimate issue of discrimination is one of fact, subject to clearly erroneous review). A finding is clearly erroneous only if on review of the entire record the court is "left with a definite and firm conviction that a mistake has been committed." Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 573 (1984) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 394-95 (1948)).

Here the testimony of defendants that the summary sheets were not an accurate means of comparing candidates for promotion and that their decision not to promote Wells was based on her limited published scholarly work rather than her race is sufficient to require that we affirm the district court's finding of no discriminatory intent. A factual finding that is based on a decision to credit the testimony of witnesses who have given a factually-plausible version of events that is not internally inconsistent nor flatly contradicted by indisputable extrinsic evidence may but rarely be rejected as clearly erroneous. Anderson, 470 U.S. at 575. The testimony here in question is a plausible account that is not vulnerable on either score. We must therefore affirm the dispositive finding based upon its acceptance.

We also find no error in the district court's rejection of Wells' due process claim. We held in Siu v. Johnson, 748 F.2d 238 (4th Cir. 1984), that even making the tenuous assumption that state procedures and regulations concerning the granting of

tenure created a constitutionally protected property interest, the only process due would be freedom from so manifestly arbitrary and capricious a decision making process that the exercise of professional judgment could not be said to have been involved in the decision. Id. at 245. Later in that opinion we suggested that "reckless inattention to relevant materials" might arguably make a decision arbitrary and capricious. Id. at 246. Seizing on this suggestion, Wells argues that the failure of Hall and members of the University Committee to read the documents submitted in support of her request for promotion made their decision arbitrary and capricious.

Even assuming that Wells has a protectible property interest, the failure of some of the persons involved in the review process to read all of the materials submitted does not of itself demonstrate that the decision-making process was arbitrary and capricious. Wells' documents were studied and reviewed by the School Committee and Dean Harris before they made their promotion recommendations. Their comments on Wells' work were included in the

materials submitted to Hall and the University Committee. That Hall and the University Committee felt comfortable in relying on that assessment does not suggest that their decisions were made arbitrarily and capriciously.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MABEL G. WELLS, Plaintiff, v. VIRGINIA COMMONWEALTH UNIVERSITY, et al., Defendants.	)))))Civil Action No.)85-0274-R)))

MEMORANDUM

Plaintiff, Mabel G. Wells ("Wells") filed suit under 42 U.S.C. §§1981 and 1983 and 42 U.S.C. §2000e-2, Title VII of the Civil Rights Act of 1964 against Virginia Commonwealth University ("VCU") and Wayne C. Hall, individually, and in his official capacity as Provost and Vice President of Academic Affairs for VCU.

Wells alleged that the University's decision not to promote her was violative of both her constitutional and statutory rights : she argued that it was her race - Black, and sex - Female, which motivated the University's decision to deny her promotion to full professorship. Wells sought declaratory and injunctive relief, as well as money damages for lost

backpay, frontpay, and injuries received from the intentional infliction of emotional distress.

In an effort to clarify the issues for trial, defendants filed a motion for partial summary judgment, which was uncontested by plaintiff. Upon its review of the defendants' motion, the Court held that the case would be tried against the defendant Hall, individually, on the issues joined as to 42 U.S.C. §§1981 and 1983, and against the defendant "VCU" as to the issues joined which sought declaratory and/or injunctive relief as well as claims against said defendant premised on 42 U.S.C. §2000e, et seq.

This matter was then heard before the Court, sitting without a jury, on December 20, 1985, and January 3, 1986. The matter has not been fully tried before the Court and is ripe for disposition.

I. Facts

Wells has been employed in the field of social work since 1957, when she began her career as a child welfare worker in Washington, D.C. However, Wells' complaint concerns only her career as professor of social work, and accordingly, the Court will focus,

in its review of the facts, on only those years which are associated with her academic employment.

Wells entered the academic profession in 1966 when she accepted employment as an assistant professor at California State University/Fresno ("CSU/Fresno") in the School of Social Work. She taught at CSU/Fresno until 1969, when in that year she left her position to accept an assistant professorship at Smith College in their School of Social Work. Wells taught at Smith College for two years, and in 1971 decided to pursue her doctorate in Social Work, full-time, at Bryn Mawr College in Bryn Mawr, Pennsylvania. After two years of full-time study, she reentered the teaching profession as an assistant professor in the School of Social Work at VCU. Wells has been employed at VCU since 1973 in their School of Social Work and presently holds the rank of associate professor.

In 1983, after ten years of employment at VCU, Wells nominated herself to the academic rank of full professor. Her application--as are all applications for promotion--was evaluated in accordance with the

rules and regulations proscribed in the University's Uniform Promotion and Tenure Policy Guidebook ("policy"). This policy has two basic purposes: (1) to establish a criteria for reviewing all applications, and (2) to establish a formal evaluation procedure. This policy has been in effect at VCU since September 24, 1981.

The policy establishes two categories of criteria which the evaluating teams are bound to follow: general and specific. The general criteria, applicable to all faculty eligible for promotion, include: "(1) appropriate preparation, background and experience, (2) demonstrated quality in teaching, (3) continuint scholarship and professional growth, (4) performance of service responsibilities to the university, school, department, profession and broader community, and (5) possession of relevant personal qualities." See Policy, p. 10. The specific criteria require the individual schools to amplify the general criteria whereby the reviewing board can assess an applicant's accomplishments in light of the peculiarities of the applicant's school. In conformance with

the Policy, the School of Social work has promulgated its own Promotion and Tenure Document which explains, in detail, the criteria which are specific to a promotion in the School of Social Work.

The University's policy also outlines the procedural framework to be followed in the review of a faculty member's application for promotion. In order to more fully understand the review of Wells' application, the procedure is briefly outlined in the following paragraphs.

First, a Promotion and Tenure Committee is established in the School wherein the applicant seeks promotion. In the instant case the School of Social Work established a committee ("School Committee'), comprised of seven persons, six tenured faculty members from the School of Social Work and one graduate student. The School Committee met on four separate occasions--November 1, November 10, December 5 and December 12, 1983 -- to consider Wells' promotion to full professor. After its consideration of all Wells' materials, including her curriculum vita, personal statement, and recommendations from various national, state, and local persons in the field of social work,

it voted 5 for and 2 against Wells' promotion to the rank of full professor. Since a majority vote is all that is needed for the School Committee to recommend a candidate's promotion, it then submitted its recommendation supporting Wells' promotion to Dr. Grace E. Harris, the Dean of the School of Social Work.

The next step in the promotion review procedure is for the Dean to examine the School Committee's recommendation, and to make her recommendation to the Vice President for Academic Affairs. In the instant case, after Dr. Harris reviewed the available materials, she recommended to the Vice President for Academic Affairs, Wayne C. Hall, that Wells be promoted to the rank of full professor. In her letter of recommendation, Dr. Harris wrote, "I support strongly the recommendation of the [School Committee] for Dr. Wells' promotion to the rank of Professor. She meets all of the criteria set forth in the School of Social Work guidelines for this promotion." See Plaintiff's Exhibit 3.

The next person in line to review an application for promotion is the Vice President of Academic

Affairs. In the instant case Wayne C. Hall, Vice President of Academic Affairs, submitted his recommendation not to promote Wells to full professor to the Chairman of the University Promotion and Tenure Committee. He observed that Wells was, "lacking in research and publication at the levels expected of a full professor to gain national recognition." See Plaintiff's Exhibit 5.

After Dr. Hall's review, the guidelines provided a review by the University Promotion and Tenure Committee ("University Committee"). The University Committee is made up of tenured faculty members from various schools and departments in VCU. The University Committee, chaired by Dr. Hugo Seibel, voted unanimously against Wells' promotion. The Committee commented that:

> Even though minimum criteria might have been met on the surface, the lack of scholarly activity and national reputation required or desired for advancement to the highest rank make a positive decision difficult. In view of all the evidence a negative decision is appropriate. See Plaintiff's Exhibit 6.

Since only positive recommendations from the University Committee are brought to the attention of the

President of VCU, Wells' promotion request never reached the President for his consideration.

In accordance with established VCU procedures, plaintiff then appealed the decision of the University Committee to the University Promotion and Tenure Appeal Panel (Appeal Panel). The Appeal Panel, after considering Wells' case, voted unanimously to affirm the decision of the University Committee.

Following the denial of her appeal by the Appeal Panel, Wells filed a charge of racial and sex discrimination with the Equal Employment Opportunity Commission ("EEOC") contending that her failure to be promoted constituted discrimination on the basis of race and sex. After receiving a right to sue letter from the EEOC, Wells filed the present claim against defendants VCU and Wayne C. Hall.

II. Merits

1. Racial and Sex Discrimination

Wells originally brought this suit against Wayne C. Hall ("Hall") and VCU under 42 U.S.C. §§1981, 2000e et seq. alleging that she was denied a promotion to full professorship, because of her race

(black) and sex (female). The constitutional violations claimed by Wells required that she prove, by a preponderance of the evidence, that the defendants purposefully discriminated against her on these grounds. See Washington v. Davis,426 U.S. 229, 239-45 (1976).

The Court finds that Wells has not suffered from either racial or sex discrimination.

Each witness, when asked by the defense counsel whether race or sex was considered in their review of her promotion, emphatically denied any such possibility. And the Court, upon its review of all materials submitted by counsel, can find no trace of evidence which can even remotely be associated with a discriminatory motive on the part of the defendants. In fact, the lack of a discriminatory motive was buttressed by Wells herself. During her own testimony, she stated to the Court that her complaint was based on exasperation with the school's decision not to promote her: she felt as if there could be no other possible explanation for the denial of her promotion than a concern, on the part of the defendants, with either her race and/or sex.

Whether assessed under the special proof scheme developed for circumstantial proof of disparate treatment in Title VII litigation, see, e.g., Banerjee v. Board of Trustees of Smith College, 495 S. Supp. 1148, 1156 (D. Mass. 1980) aff'd 648 F. 2d 61 (1st Cir. 1981), or under ordinary principles for the assessment of conflicting evidence of motivation, see Lovelace v. Sherwin-Williams Co., 681 F. 2d 230 (4th Cir. 1982), the court can simply find no discrimination.

2. Equal Protection

Wells bases her constitutional equal protection claim on the alleged failure of the defendants to apply the same standards in evaluating her qualifications for promotion and "scholarly achievements" as were used in the past in passing on promotions of other faculty members. Wells argues that the defendants' failure to even review those documents' contents, in light of the fact that they had reviewed the contents of other applicants'documents, represents an inadequacy in the process which constituts (sic) arbitrary and capricious conduct.

The Court disagrees.

In Clark v. Whiting, 607 F.2d 634 (4th Cir. 1979), plaintiff, an associate professor of biology at North Carolina Central University, brought suit under 42 U.S.C. § 1983 against the University alleging that its denial of his several requests for academic promotion to a full professorship violated his constitutional rights protected by the equal protection and due process clauses. Clark's equal protection argument was that the "several denials of his promotion were based on the opinion of the University administration that he had not given sufficient concrete evidence of continued growth by scholarly contributions of his field to warrant promotion to a full professorship." Clark, supra, at 637 (emphasis added). (The plaintiff in Clark submitted, in support of his request for promotion and in evidence of his 'scholarly contributions,' a "'self-published' laboratory manual prepared by the plaintiff for use in his classes, his Ph.D. thesis and, finally, an article accepted for publication but not at the time published." Clark, supra at 637-38.)

The Court criticized the plaintiff in Clark for trying to "convert federal courts into "Super-Tenure [and Faculty Promotion] Review Committees compelled to review every denial by a state-supported college, university or school of faculty promotion, by that faculty member resorting to the "'I'm just as good as you are' arguments," Clark, supra at 638. The Clark court noted that what its plaintiff, like Wells in the instant case, has failed to realize is that "not every difference in promotion treatment--particularly a difference not in resolving questions of primary facts but in evaluating facts--rises to the level of a constitutional deprivation either under equal protection or due process." Clark, supra at 638. The court then held that "[i]t is only when such unequal treatment, accorded under reasonable rules providing for the exercise of subjective discretion, violates a positive constitutional requirement that one subjected to such violation will have a remedy under § 1983." Id., citing Prince v. Bridges, 537 F.2d 1269, 1272 (4th Cir. 1976); Equal Employment Opportunity Com'n v. Tufts Inst.,

421 F. Supp. 152, 158 (D. Mass. 1975); Peters v. Middlebury College, 409 F. Supp. 857, 858 (D. Vt. 1976).[1]

Wells presented evidence to the Court, identical to the evidence presented to the various committees when they reviewed her file for promotion, regarding the extent of her scholarly achievements. Her scholarly achievements included one published article in a refereed journal,[2] one article which was accepted for publication in a refereed journal but at the time of her review had not yet been published, and several unpublished materials, including papers presented at various international, national and state and local conferences.

The School Committee did review the documents submitted by Wells, and although it voted for her promotion, it also noted that she had limited productivity in the area of research and publications. Dr. Harris, the Dean of the School of Social Work, recognized the School Committee's concern over her lack of published materials. Her recommendation to Dean Hall noted that "[a]lthough her published work

is somewhat limited, she has compensated for this by presenting papers, serving on accreditation teams, and participating on various panels and programs at the local, state, and national level." Dr. Harris went on to state that "[t]his is not an unusual pattern for a faculty member in social work education...." Wells' file was then sent to Dean Hall for his review and recommendation. Dean Hall had access to Wells' documents, but never requested them. He refused to recommend her promotion, stating that she lacked in research and publication at the levels expected of a full professor to gain national recognition." See Plaintiff's Exhibit 3. The University Committee also failed to review the content of Wells' publication(s) despite their availability, and denied her promotion based on her "lack of research and publications." See Plaintiff's Exhibit 5.

Wells contends that her constitutional rights have been violated due to the fact that Dean Hall and the University Committee did not read her scholarly documents. However, this Court finds that their decision not to read the documents does not rise to a

constitutional deprivation violative of the equal protection clause.

> A teacher's competence and qualifications for tenure or promotion are by their very nature matters calling for highly subjective determinations, determinations which do not lend themselves to precise qualifications and are not susceptible to mechanical measurement or the use of standardized tests. These determinations are in "an area in which school officials must remain free to exercise their judgment" especially since these determinations present unique questions for judgment by those with expertise in the specialized academic area, capable of making professional evaluations of those elusive and intangible qualities and talents expected of the scholar and teacher. Courts are not qualified to review and substitute their judgments of professional experts on faculty promotions or to engage independently in an intelligent informal comparison of the scholarly contributions or teaching talents of one faculty member denied promotion with those of another faculty member granted a promotion; in short, courts may not engage in "second-guessing" the University authorities in connection with faculty promotions.

Clark, supra at 639-40.

VCU, and in particular Dean Hall and the University Committee, never questioned the quality of Wells' publication(s). However, it was their opinion that her lack in number of published scholarly works was insufficient to warrant a

promotion to full professor. They did not arbitrarily come to that conclusion, but instead, after careful review at all levels, decided that it was the quantity of publications which prohibited the University from granting a promotion. In fact, the University Committee, in its negative recommendation, noted that her application was simply "premature," inferring that in time she will author the requisite number of publications which could support her application for full professor.

III. Conclusion

Wells has failed to satisfy the Court that she was discriminated against on account of either her race - black, or sex - female. She has equally failed to demonstrate to the Court that she was denied equal protection of the laws as provided for in the U.S. Constitution. What Wells argues

> ...for, if carried to its logical conclusion, is the judicial supervision of the most delicate part of every state educational institution's academic operations, a role federal courts have neither the competency nor the resources to undertake. The burden, which such an exercise of judicial process would involve, was vividly described by the Court in Fare v. New York University, supra, 502 F.2d at 1231-32, which concluded that "[o]f all fields, which the federal courts should

> hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision.

Clark, supra at 640.

The Court must deny all claims presented by Wells in this action.

An appropriate order shall issue.

s/
UNITED STATES DISTRICT JUDGE

Date FEB 27 1986

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1 The Clark court drew attention to the fact that "[f]ederal courts have never been hesitant to intervene on constitutional grounds in the hiring, discharge or promotion of public employees, including academic personnel, where the asserted claim is that the action taken was tainted by racial or sex discrimination." Clark, supra at 639. The court has found in this opinion that Wells suffered from no racial or sexual discrimination. See supra, part 1. Accordingly, as the United Courts (sic) Court of Appeal for the Fourth Circuit noted in Clark, "absent such impermissible sex or racial discriminations or First Amendment restraints--clear violations of positive express constitutional statutory mandate--the federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." Clark, supra at 639.

2 Refereed journal was described as one which will not accept a manuscript for publication until it has undergone and passed a peer review process.

NO. 87-143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

Supreme Court, U.S.
FILED
AUG 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

MABEL G. WELLS,

Petitioner,

VIRGINIA COMMONWEALTH UNIVERSITY

and

WAYNE C. HALL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE RESPONDENTS IN OPPOSITION

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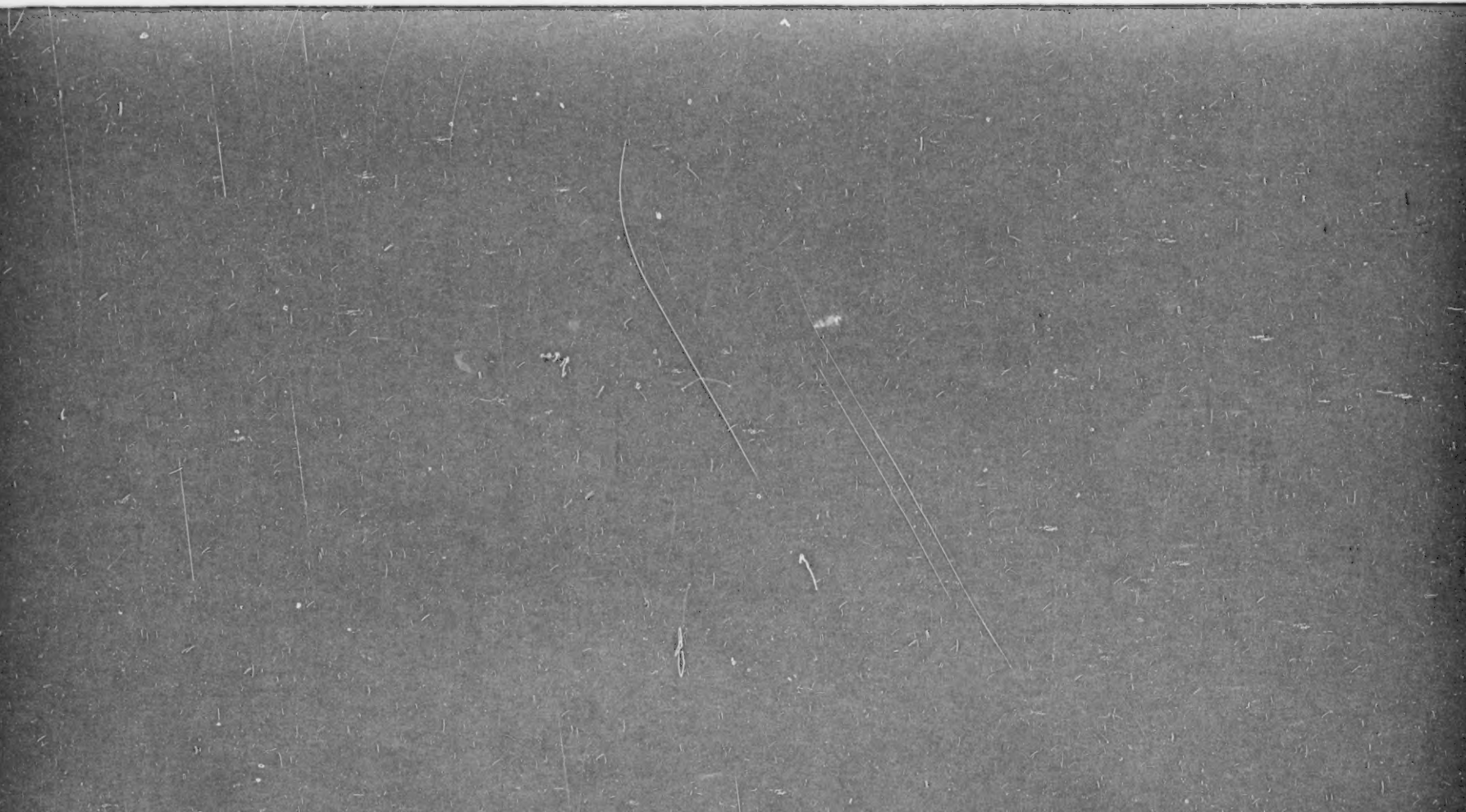

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IN THE

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OCTOBER TERM, 1987

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MABEL G. WELLS,

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WAYNE C. HALL,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE RESPONDENTS IN OPPOSITION

Respondents, Virginia Commonwealth University and Wayne C. Hall, by counsel, respectfully request that this Court deny the Petition for a Writ of

Certiorari, which seeks review of the Order for the Court of Appeals of the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not reported. A copy of the opinion appears in Petitioner's Appendix at pages A-1 through A-9. The opinion of the United States District Court for the Eastern District of Virginia is also unreported; a copy appears in Petitioner's Appendix at pages A-10 through A-27.

STATEMENT OF THE CASE

Petitioner, a black female, currently is employed as a tenured associate professor in the School of Social Work at Respondent Virginia Commonwealth University ("VCU"). (App. 33). (Parenthe-

tical references are to the Joint Appendix filed in the appeal below with the United States Court of Appeals for the Fourth Circuit, Record No. 86-1561). VCU is a state university located in Richmond, Virginia.

Petitioner nominated herself for promotion to the rank of full professor in November, 1983. (App. 166). Her application was evaluated in accordance with the rules and regulations prescribed in VCU's Promotion and Tenure Policies and Procedures document ("Policy"). (App. 119). The Policy has two basic purposes: (1) to establish criteria for reviewing all applications, and (2) to establish a formal evaluation procedure.

The first step in the evaluation

procedure under the Policy is a review by a promotion and tenure committee in the school wherein the applicant seeks promotion. The committee established in the School of Social Work to evaluate Petitioner's candidacy for promotion reviewed her application and voted 5 to 2 in favor of Wells' promotion. (App. 78).

The next step in the review and evaluation process was for the dean of the school to examine the school committee's recommendation and to make a recommendation to the Vice President for Academic Affairs. (App. 119 at p.12). Dr. Grace E. Harris, the Dean of the School of Social Work, reviewed Petitioner's file and, although acknowledging Petitioner's limitations in terms of published scholarly materials, neverthe-

less recommended that Petitioner be promoted to full professor. (App. 79-80).

The next person in line to review Petitioner's application was the Vice President for Academic Affairs, Respondent Wayne C. Hall. Without personally reading all of the materials submitted by Wells in support of her application but after reviewing Petitioner's file, which included the reports and recommendations of the School Committee and the Dean of the School, Hall forwarded to the University Promotion and Tenure Committee ("University Committee") his recommendation that Petitioner not be promoted. Hall observed that Petitioner was "lacking in research and publication at the levels expected of a full professor to gain national recognition." (App. 82).

Following its review of the Petitioner's file, which included all reports and recommendations from prior reviewers, but without reading all of Petitioner's published materials, the University Committee voted unanimously against recommending Petitioner for promotion, noting her lack of scholarly activity and national reputation. (App. 83). Contrary to the statements in Petitioner's Statement of the Case, the trial record does not support her stated factual conclusion that Respondent Hall and the University Committee ignored the School of Social Work's criteria for promotion and tenure. In fact, the Chairman of the University Committee testified that the Committee followed both the University and the School documents (App. 295). He testified further

that the University Committee felt that by recommending Petitioner for promotion in the face of acknowledged weakness in Petitioner's scholarly publication record, the School Committee and the Dean had failed to follow their own School guidelines. (App. 327).

Petitioner appealed the decision of the University Committee to the University Promotion and Tenure Appeal Panel ("Appeal Panel") which, after consideration of Petitioner's appeal, voted unanimously to affirm the decision of the University Committee. (App. 122). The negative decision of the Appeal Panel was subject to no further appeals within VCU. (App. 119 at p.16).

Petitioner ultimately filed suit in the United States District Court for the Eastern District of Virginia, Rich-

mond Division, claiming that she was discriminated against in the promotion process based upon her race and sex in violation of her statutory and constitutional rights. Following a trial on the merits, the District Court, finding that Petitioner had failed to carry her burden of proving either that she had been the victim of discrimination or that she had been denied her constitutional rights, entered judgment in favor of Respondents on all counts.

On appeal to the Fourth Circuit Court of Appeals, the District Court's decision was affirmed in all respects.

ARGUMENT

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE COURTS BELOW HAVE GIVEN FULL CONSIDERATION TO THE ISSUES AND DECIDED THEM CORRECTLY.

Petitioner seeks to have this Court reconsider arguments and evidence which have been fully considered and, Respondents submit, correctly decided by the courts below. Petitioner sought to convince the trial court that the Respondents' failure to grant her promotion request was motivated by impermissible racial and gender animus and that the failure of certain persons in the promotion review process to read all of her supporting documents violated her constitutional rights. The Honorable Robert R. Merhige, United States District Judge, concluded that Petitioner failed to establish that she had been discriminated against on the basis of either race or sex and had failed to demonstrate that she had been deprived of her constitutional rights, finding that Respondents

had not acted arbitrarily in denying her promotion as had been alleged by Petitioner.

On appeal to the Fourth Circuit Court of Appeals, Petitioner again asserted that the failure of Respondent Hall and the University Committee to read all of her supporting documents constituted an inadequacy in the review process in alleged contravention of her rights under the due process clause and that the failure of the trial court to find evidence of discrimination on the basis of race was in error. The Court of Appeals, in a per curiam decision affirming the District Court's decision, found sufficient support in the record to uphold the trial court's dispositive findings of no discriminatory intent. With respect to Petitioner's due process

claim, the Court of Appeals similarly found that the alleged failure to review all arguably relevant materials in the promotion review process did not render the decision an arbitrary and capricious one, as had been argued by Petitioner. Petitioner now seeks to have this Court address these same issues raised below and, effectively, to re-examine the evidence offered by Petitioner in support of her claims.

Granting certiorari in this case would be most inappropriate. This Court clearly has ruled that it does not grant certiorari to review evidence or inferences drawn from it or to discuss specific facts. General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 75 (1938), reh'g denied, 305 U.S. 675 (1939); United States v. Johnston, 268

U.S. 220, 227 (1925). Being a court of law rather than a court for correction of errors in fact finding, this Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949); Berenyi v. Immigration Director, 385 U.S. 630, 635 (1967). There has been no such showing in this case. The Court of Appeals applied the correct standard for review of the factual findings of the District Court and concluded that its findings were not clearly erroneous. Anderson v. City of Bessemer City, 470 U.S. 564 (1984); Pullman-Standard v. Swint, 456 U.S. 273 (1982). The Court of Appeals similarly found that the facts alleged in support of Pe-

titioner's due process argument did not demonstrate that the decision-making process was arbitrary and capricious.

Petitioner now requests this Court to balance the evidence presented to and to scrutinize the consideration of the facts previously undertaken by the District Court and the Court of Appeals and resolved twice against the Petitioner. This Court should not accept the invitation to undertake a third review of the evidence in this case. Bohmer v. Pennsylvania R.R., 252 U.S. 496 (1920).

II THE PETITION PRESENTS A QUESTION TO THIS COURT THAT WAS NOT RAISED BELOW.

Petitioner attempts to urge upon this Court consideration of a question (Petitioner's Question II.) that was not presented to the appellate court below. Petitioner presented only two

issues to the Court of Appeals, which issues correspond to Questions I and III raised in her Petition to this Court. (See Respondent's Appendix A, Petitioner's Statement of the Issues Presented for Review to the Fourth Circuit Court of Appeals). Petitioner argued to the Court of Appeals neither that the Respondents had "ignored" her School's criteria for promotion nor that, as a result, she had been denied due process; and the record of the trial court would not have supported such arguments in any event. This Court simply must reject Petitioner's invitation to rule on an issue not raised below. Delta Airlines v. August, 450 U.S. 346, 362 (1981); Sonzinsky v. United States, 300 U.S. 506 (1937).

III. THE ISSUES ARE NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S ATTENTION.

The questions raised in the Petition turn on the particular facts of this case alone and are of interest only to the parties to this case. As suggested above, Petitioner asks this Court to make a third review of the lengthy trial record and see if it can find what the two lower courts have been unable to find: proof of racially discriminatory treatment and proof of denials of due process or other constitutional rights. Such fact canvassing is not a task to be served by a grant of certiorari. United States v. Johnston, supra. Certiorari is granted only in cases involving principles the settlement of which is of importance to the public as distinguished

from the parties. NLRB v. Pittsburgh S.S. Co., 340 U.S. 498 (1951).

IV. THE COURT OF APPEALS HAS NOT RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS OR OF THIS COURT ON THE SAME MATTER.

Petitioner has cited no conflict between the decision of the Fourth Circuit Court of Appeals in this case and the decisions of other Circuit Courts of Appeals or of this Court on the same matter. In fact, and with the exception of citations to decisions of this Court which speak to the burden of proof scheme in discrimination cases, from which neither the District Court nor the Court of Appeals departed in the present case, the only case cited by Petitioner is another decision of the Fourth Circuit Court of

Appeals, Clark v. Whiting, 607 F.2d 634 (4th Cir. 1979), which Petitioner mistakenly suggests was cited and relied upon by the Fourth Circuit in the present case. The Clark case was cited and relied upon by the District Court, but no mention of the Clark case appears in the Fourth Circuit's decision. Petitioner simply offers no legitimate basis for this Court to undertake review of her case and her invitation to review should be denied.

V. THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

Petitioner's due process issues presented to this Court are premised on the assumption that she had a protected property interest in the promotion which she claims she wrongfully was denied or in the procedures by which such decisions

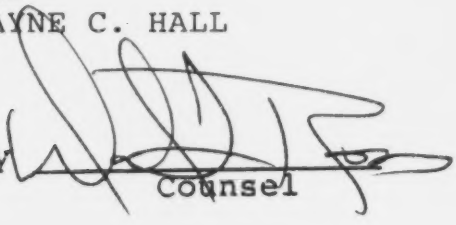
were made. However, Petitioner demonstrated below no more than a unilateral expectation that her promotion would be forthcoming. Such is insufficient to create a "property interest" so as to invoke the protections of the due process clause. Board of Regents v. Roth, 408 U.S. 564 (1972). The Court of Appeals found it unnecessary to rule on the question of whether Petitioner had a protected property interest, choosing instead to assume, for the purpose of review only, the existence of such a protectible property interest before going on to conclude that Petitioner had not been denied due process. However, absent a clear demonstration of the existence of a protected property interest, Petitioner's due process claims present no substantial federal question warranting review by this Court.

CONCLUSION

Respondents, therefore, request that the decision of the Court of Appeals be affirmed and that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

VIRGINIA COMMONWEALTH UNIVERSITY
AND
WAYNE C. HALL

By 
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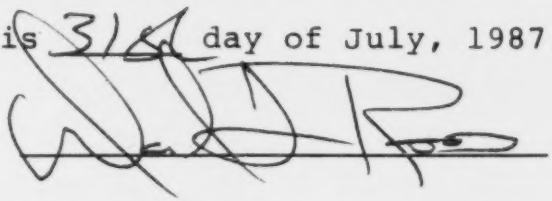
CERTIFICATE OF SERVICE

I hereby certify that two (2) true and exact copies of the foregoing Petition was mailed, postage prepaid, to Mabel G. Wells, Petitioner, pro se, 3404 Gloucester Road, Richmond, Virginia 23227, on this 31st day of July, 1987.



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APPENDIX A

PETITIONER'S STATEMENT OF THE ISSUES PRESENTED TO THE FOURTH CIRCUIT COURT OF APPEALS

I. WHETHER THE DECISION NOT TO READ THE SCHOLARLY DOCUMENTS SUPPORTING APPELLANT'S CANDIDACY FOR FULL PROFESSORSHIP BY THE VICE PRESIDENT FOR ACADEMIC AFFAIRS FOR VIRGINIA COMMONWEALTH UNIVERSITY (VCU) AND THE UNIVERSITY COMMITTEE ROSE TO A CONSTITUTIONAL DEPRIVATION VIOLATIVE OF THE DUE PROCESS CLAUSE.

II. WHETHER THE TRIAL COURT ERRED IN FINDING THAT APPELLANT WAS NOT DISCRIMINATED AGAINST BASED ON HER RACE.